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| Title      | Family Law Rules: Motion to Quash and Application for Court Order (adopt rule 5.121, amend rules 5.118 and 5.120)  |
| Summary    | These rules would clarify the procedures relating to a motion to quash, clarify that the court may grant or deny relief sought on a motion solely on the basis of the application and responses, and correct certain technical errors.   |
| Source     | Family and Juvenile Law Advisory Committee   |
| Staff      | Bonnie Hough, 415-865-7668   |
| Discussion | <p>California Rules of Court regarding family law were rewritten and renumbered as of January 1, 2003. These changes were designed to follow the new Judicial Council numbering system, to reflect recent changes in the law and procedure, and to make the rules easier to read and more accessible to court users. No substantive changes were intended with the revision.</p> <p>The rules that refer to procedures set out in the Code of Civil Procedure—such as a motion to quash proceeding, availability of lis pendens, and similar actions—were deleted as unnecessary. Rule 5.140 (Implied procedures) further stated that “if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules.”</p> <p>Thus, procedures relating to a motion to quash, which is in the nature of a special demurrer, were eliminated because they are already discussed in the Code of Civil Procedure. The motion to quash was authorized by rule 5.120(a)(3), which states that the motion constitutes a general appearance.</p> <p>However, Code of Civil Procedure section 418.10 was amended as of January 1, 2003 (Sen. Bill 1325; Stats. 2002, ch. 69) to provide that a defendant may simultaneously file a motion to quash service of summons or a forum non conveniens motion and an answer (or motion to strike) without making a general appearance. Thus, the simultaneously filed answer is held in abeyance until disposition on the motion to quash summons; the filed answer amounts to a general appearance only upon entry of an order denying the motion to quash summons or upon final conclusion of the writ proceedings if defendant petitioned for writ review of the denial.</p> |

Rule 5.120 is now in conflict with this revised statute and should be amended to provide that filing a motion to quash is not considered a general appearance and to set out the time frames for responding to such a motion.

Proposed rule 5.121, (Motion to quash proceeding or responsive relief) restates former rules 1230, 1232, and 1239, which all covered motions to quash. It is intended to eliminate confusion about these procedures and to coordinate with amended rule 5.120.

Previous rule 1225 provided that a court may grant or deny relief sought in a motion solely on the basis of the application and responses and any accompanying memorandum of points and authorities. That section was removed since it appears to restate the law in this area. However, the Judicial Council has received requests to reinstate this rule to assist in the administration of justice. That proposed reinstatement is set out in amended rule 5.118.

The text of the new and amended rules is attached at pages 3–4.

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Attachments

Rule 5.118, 5.120, and 5.121 of the California Rules of Court would be adopted and amended, effective January 1, 2004, to read:

**Rule 5.118. Application for court order**

(a)–(e) \* \* \*

(f) The court may grant or deny the relief solely on the basis of the application and responses and any accompanying memorandum of points and authorities.

**Rule 5.120. Appearance**

(a) A respondent or defendant appears in a proceeding when he or she files:

(1)–(2) \* \* \*

~~(2) A notice of motion to quash the proceeding based on:~~

~~a. Petitioner’s lack of legal capacity to sue,~~

~~b. Prior judgment or another action pending between the same parties for the same cause,~~

~~c. Failure to meet the residence requirement of Family Code section 2320, or~~

~~d. Statute of limitations in Family Code section 2211;~~

~~(4)(3)~~ \* \* \*

~~(5)(4)~~ \* \* \*

(b)–(c) \* \* \*

**5.121 Motion to quash proceeding or responsive relief**

(a) Within the time permitted to file a response, the respondent may move to quash the proceeding, in whole or in part, for any of the following:

(1) Lack of legal capacity to sue,

1           (2) Prior judgment or another action pending between the same parties  
2           for the same cause,

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4           (3) Failure to meet the residence requirement of Family Code section  
5           2320, or

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7           (4) Statute of limitations in Family Code section 2211.

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9           (b) The hearing for any notice of motion to quash must be scheduled not  
10          more than 20 days from the date the notice is filed. If the respondent  
11          files a notice of motion to quash, no default may be entered and the time  
12          to file a response will be extended until 15 days after service of the  
13          court's order.

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15          (c) Within 15 days after the filing of the response, the petitioner may move  
16          to quash, in whole or in part, any request for affirmative relief in the  
17          response for the grounds set forth in (a).

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19          (d) The parties are deemed to have waived the grounds set forth in (a) if  
20          they do not file a motion to quash within the time frame set forth.

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22          (e) When a motion to quash is granted, the court may grant leave to amend  
23          the petition or response and set a date for filing the amended pleadings.  
24          The court may also dismiss the action without leave to amend. The  
25          action may also be dismissed if the motion has been sustained with  
26          leave to amend and the amendment is not made within the time  
27          permitted by the court.  
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